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No. 94-1140

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

44 LIQUORMART, INC., *et al.*,
Petitioners,

v.

STATE OF RHODE ISLAND, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF *AMICI CURIAE* OF THE WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center with more than 100,000 supporters nationwide. While WLF engages in

litigation and the administrative process in a variety of areas, WLF also devotes a substantial portion of its resources to promoting commercial free speech rights. To that end, WLF has appeared before this Court and other courts in numerous cases dealing with commercial speech issues, including, most recently *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995). *See also Washington Legal Foundation v. Kessler*, No. 94 CV 01306 (D.D.C., filed June 13, 1994) (challenge to the Food and Drug Administration's policy banning the dissemination of certain truthful and non-misleading information concerning drugs and medical devices to the medical community).

The Allied Educational Foundation ("AEF") is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, including law and public policy. AEF has appeared before this Court along with WLF as an amicus curiae in constitutional cases. *See, e.g., Simon & Shuster, Inc. v. Members of the New York State Crime Victims Board*, 112 S. Ct. 501 (1991).[1]

SUMMARY OF ARGUMENT

1. Just last year, in *Ibanez v. Florida Department of Business and Professional Regulation*, 114 S. Ct. 2084 (1994), this Court stated that only commercial speech that is false, deceptive, or misleading can be *banned*. The

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[1] Letters of consent to the filing of this brief from counsel for the parties have been filed with the Clerk of this Court.

alcohol beverage price advertising that Rhode Island has prohibited is concededly truthful and non-misleading. Under *Ibanez*, therefore, Rhode Island's price advertising ban violates the First Amendment.

2. Even if the categorical language of *Ibanez* is put to the side, Rhode Island has failed to demonstrate that its price advertising ban is justified under the four-part test established by this Court in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980).

a. Under the second prong of the *Central Hudson* test, a restriction on commercial speech must serve a "substantial" governmental interest. In this case, Rhode Island aims to protect consumers by keeping them in the dark. Its purpose is to shield consumers from truthful, non-misleading commercial information the State fears they will "mishandle." This is not even a legitimate governmental interest, much less a "substantial" one. Such paternalism is "anathema to the First Amendment." *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1597 (1995) (Stevens, J., concurring in the judgment).

As the Court has recognized in case after case, the First Amendment assumes that people are capable of perceiving their own best interests, and it prohibits the government from pursuing its objectives, however benevolent, by means that rely on public ignorance. The First Amendment does not allow the government to ban or restrict otherwise protected commercial speech as a means of regulating the lawful choices that consumers make. To the extent that *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), is to the contrary, it should be overruled.

b. Even assuming that Rhode Island's purpose in this case is not forbidden, the State has failed to meet its burden of justification under the third and fourth prongs of the *Central Hudson* test. The State has failed to demonstrate that its ban on alcohol beverage price advertising "directly and materially" promotes "temperance" and is not more extensive than necessary to achieve that purpose. The court below abdicated its review function both in accepting Rhode Island's unsubstantiated assertions regarding the efficacy of its price advertising ban, and in deprecating the availability of obvious alternatives that do not entail the suppression of speech.

If the First Amendment's protection of commercial speech is to be meaningful, then, when commercial speech is restricted, the government must be required to demonstrate, by a preponderance of the evidence adduced at trial, that the restriction "will in fact" directly and materially advance the government's asserted interests, and is not more extensive than necessary. *Edenfield v. Fane*, 113 S. Ct. 1792, 1800 (1993). As in a noncommercial speech case, the factual determinations claimed to support a content-based commercial speech restriction must be subject to *de novo* judicial review. Absent such judicial scrutiny, the courts are mere rubber stamps and the First Amendment's promise of protection for commercial speech cannot be honored.

ARGUMENT

I. UNDER *IBANEZ*, TRUTHFUL, NON-MISLEADING COMMERCIAL SPEECH MAY NOT BE BANNED.

The question on which review was granted is "[w]hether Rhode Island may, consistent with the First Amendment, prohibit truthful, non-misleading price advertising regarding alcoholic beverages." With respect, this question has already been answered. Two years ago, the Court stated categorically that commercial speech that is not false, deceptive, or misleading can be *restricted*, but "only false, deceptive, or misleading commercial speech may be *banned*." *Ibanez v. Florida Department of Business and Professional Regulation*, 114 S. Ct. 2084, 2088 (1994) (emphasis added) (citations omitted).

The rule stated in *Ibanez* reflects a recognition, firmly grounded in the Court's commercial speech cases and its general First Amendment jurisprudence, that knowledge itself can never be harmful. Commercial speech that is not false, deceptive, or misleading may not be deemed injurious in and of itself, and thus subject to absolute suppression. Any harms thought to be posed by such speech must be related to the *circumstances or conditions* under which the speech is uttered, and so must be avoided through restrictions short of a ban that leave "ample alternative channels for receipt of information." *Florida Bar v. Went For It, Inc.*, No. 94-226, slip op., at 16 (June 21, 1995); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 457 & n.13 (1978).

The speech at issue in this case — alcohol beverage price advertising — is concededly truthful and non-

misleading, and the prohibition imposed by R.I. Gen. Laws §§ 3-8-7 and 3-8-8.1 constitutes a ban under any meaningful definition of that term.[2] As discussed below, the premise of Rhode Island's advertising ban is that knowledge of alcohol beverage prices can indeed be harmful. Thus, under *Ibanez*, Rhode Island's prohibition of truthful, non-misleading alcohol beverage price advertising violates the First Amendment.

II. THE FIRST AMENDMENT PROHIBITS THE GOVERNMENT FROM BANNING OR RESTRICTING TRUTHFUL, NON-MISLEADING COMMERCIAL SPEECH AS A MEANS OF REGULATING THE LAWFUL CHOICES THAT CONSUMERS MAKE IN THE MARKETPLACE.

A. Limiting Speech as an Indirect Means of Regulating Conduct Is Anathema to the First Amendment.

Under the second prong of the *Central Hudson* test, commercial speech may be restricted only in the service of a "substantial" governmental interest. *See Florida Bar v. Went For It, Inc., supra*, slip op., at 5; *Coors, supra*, 115 S. Ct. at 1589. Under the First Amendment, Rhode Island's purpose in prohibiting alcohol beverage adver-

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[2] The state law prohibits in the most sweeping terms "the advertising in any manner whatsoever of the price of any [alcohol beverage] offered for sale in this state." Section 3-8-7 does include a necessary exception for "price signs or tags attached to or placed on merchandise for sale within the licensed premises," but that limited exception is surely not significant enough to permit the State's prohibition to be characterized as a mere "restriction," rather than a "ban."

tising, which assumes that knowledge can be harmful, is not even legitimate, much less "substantial."

1. Rhode Island asserts that the purpose of R.I. Gen. Laws §§ 3-8-7 and 3-8.8.1 is to promote "temperance," which the State defined at trial as avoiding abusive consumption of alcohol beverages (*see* Trial Tr. at 113), and which the court below understood to mean reducing consumption of alcohol beverages generally. *44 Liquormart, Inc. v. Rhode Island*, 39 F.3d 1, 7-8 (1st Cir. 1994). Whichever characterization is accepted as a description of the State's ultimate objective, both obscure the precise nature of the "harm" the State seeks to avoid — a consumer response to truthful, non-misleading information that the State fears will be unwise.

The State explained that its ban on alcohol beverage price advertising promotes "temperance" in two ways. First, by making it difficult for consumers to identify the retailers that offer alcohol beverages at the lowest prices, the State prevents consumers from getting "more" for their money, which the State appears to equate with excessive consumption. Second, by preventing retailers from communicating price information to consumers, the State hopes to discourage retailers from competing with one another on the basis of price and thereby to keep prices high. The State assumes that, if alcohol beverage prices are lowered and consumers are made aware of that fact, excessive consumption would rise. *See* Defendant's Post Trial Memorandum at 5-6, quoted in *44 Liquormart, Inc.* v. *Racine*, 829 F. Supp. 543, 548 (D.R.I. 1993).

In either case, the State's concern is not to ensure "that the stream of commercial information flow[s] cleanly as well as freely," *Virginia State Board of Pharmacy v.*

Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 772 (1976), but to forestall an anticipated consumer response to alcohol beverage price information. This is the exact "harm" at which Rhode Island's price advertising ban is directed. Thus, for purposes of analyzing the ban under the second prong of the *Central Hudson* test, it is appropriate to view the State's "interest" as an interest in keeping consumers uninformed for their own protection, in shielding them from truthful information the State fears they will "misuse." *See Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1597 (1995) (Stevens, J., concurring in the judgment).[3] Such an interest, however, is impermissible under the First Amendment.

2. More than 75 years ago, Justice Holmes urged that political speech should be given meaningful First Amendment protection because "the ultimate good desired" is best reached through "free trade in ideas." "[T]he best test of truth," he famously wrote, "is the power of thought to get itself accepted in the competition of the market." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., joined by Brandeis, J., dissenting). Thus was born the metaphor of the "marketplace of ideas."

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[3] The fact that a reviewing court may not "supplant the precise interests put forward by the State with other suppositions," *Edenfield, supra*, 113 S. Ct. at 1798, does not mean that the court cannot discern for itself, from the manner in which the State has acted, the true nature of the State's aims. *See Virginia State Board of Pharmacy*, 425 U.S. at 769 ("close examination" of state board's justifications for prescription drug price advertising ban reveals that "the State's protectiveness of its citizens in large measure rests on the advantages of their being kept in ignorance").

The metaphor is powerful because it invokes the ideal of a *commercial* marketplace in which *products* survive or fail based on their appeal (or lack of appeal) to "intelligent and well informed consumers." *See Virginia State Board of Pharmacy, supra,* 425 U.S. at 765. Ironically, it was not until 1976 that the Court formally extended First Amendment protection to the commercial marketplace itself. But when the Court did — in a decision striking down a prohibition against prescription drug price advertising — it did so for the same basic reasons that Justice Holmes urged that First Amendment protection be afforded to speech in the political sphere.

Thus, in *Virginia State Board of Pharmacy,* the Court identified three distinct rationales, in addition to the speaker's "right to advertise," 425 U.S. at 757, for extending First Amendment protection to "dissemination of information as to who is producing and selling what product, for what reason, and at what price." *Id.* at 765. *First*, the Court observed, "the proper allocation of resources" in our free enterprise system demands that consumer decisions be "intelligent and well informed." *Id. Second*, the Court noted that unless consumers are kept informed about the operations of the free market system, they cannot form "intelligent opinions as to how that system ought to be regulated or altered." *Id. Third*, and most important, the Court interpreted the First Amendment as precluding the government from suppressing commercial speech out of a concern that consumers, once informed, will fail to perceive their own best interests:

> There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best

> interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. * * * It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.

Id. at 770.

The Court has since invoked these principles in case after case. In *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 96-97 (1977), the Court stated that the "basic" constitutional defect of an ordinance seeking to prevent white flight by forbidding the posting of "For Sale" and "Sold" signs in residential neighborhoods was its attempt to manipulate the choices of the township's residents by preventing them from obtaining information. In *Bates v. State Bar*, 433 U.S. 350, 375 (1977), the Court held a lawyer advertising restriction unconstitutional because, among other things, it rested on "the benefits of public ignorance." *See also id.* at 364-65 (stressing the "individual and societal interests" served by commercial speech "in assuring informed and reliable decision-making").

In *Central Hudson*, the Court stated:

> Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information. In applying the First Amendment to this area, we have rejected the 'highly paternalistic' view that government has complete power to suppress or

> regulate commercial speech. '[P]eople will perceive their own best interests if only they are well enough informed, and * * * the best means to that end is to open the channels of communication rather than to close them. * * *' Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all.

447 U.S. at 561-62 (citations omitted). And in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 505 (1981), the plurality — echoing *Virginia State Board of Pharmacy*, 425 U.S. at 773 — reiterated that the government "may not completely suppress the dissemination of truthful information about an entirely lawful activity merely because it is fearful of that information's effect upon * * * its recipients."[4]

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[4] Although this statement appeared in a plurality opinion, the principle was endorsed by a majority of the Court. *See id.* at 541 (Stevens, J., dissenting). *See also Carey v. Population Services Int'l*, 431 U.S. 678, 700 (1977) (noting "'substantial individual and societal interests' in the free flow of commercial information"); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978) (commercial speech cases "illustrate that the First Amendment goes beyond protection of the press and self-expression to prohibit the government from limiting the stock of information from which members of the public may draw"); *Friedman v. Rogers*, 440 U.S. 1, 8-9 (1978) (noting society's "strong interest in the free flow of commercial information"); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 79 (1983) (Rehnquist, J., joined by O'Connor, J., concurring in the judgment) (invoking anti-paternalism principle

(continued...)

More recently, in *Edenfield*, the Court once again emphasized "the societal interests in broad access to complete and accurate commercial information that First Amendment coverage of commercial speech is designed to safeguard," 113 S. Ct. at 1798, and the Court again condemned paternalistic justifications for restrictions on commercial speech:

> The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth, but the general rule is that the speaker and the audience, not the government, assess the value of the information presented.

Id.

Just last Term, in *Coors*, the Court reaffirmed that "the free flow of commercial information is 'indispensable to the proper allocation of resources in a free enterprise system' because it informs the numerous private decisions that drive the system." 115 S. Ct. at 1589. And in *Florida Bar v. Went For It, Inc.*, No. 94-226 (June 21, 1995), the Court, while upholding a restriction on lawyer advertising, pointedly disclaimed approval of commercial speech restrictions "motivated primarily by paternalism." Slip op., at 13 n.2. *See also Peel v. Attorney Registration and Disciplinary Comm'n*, 496 U.S. 91, 105 (1990) (plurality opinion) ("We reject the paternalistic assumption that the recipients of petitioner's letterhead are no more

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[4] (...continued)
of *Virginia State Board of Pharmacy*).

discriminating than the audience for children's television.").

3. In the instant case, Rhode Island has decided that the marketplace ideal invoked by Justice Holmes 75 years ago, and subsequently embraced by this Court, is flawed. The State has determined that consumers *cannot* be permitted to make their own choices, that commercial speech must be restricted because consumers, though informed, cannot "perceive their own best interests." *Virginia Board of Pharmacy, supra*, 425 U.S. at 770.

Rhode Island's paternalistic purpose is incompatible with the reasoning that led the Court to extend First Amendment protection to commercial speech. No distinctions exist that might allow the government to "protect" people by keeping them in ignorance when choosing among goods and services, but not when choosing among ideologies. If people cannot be counted on to perceive "their own best interests" in the marketplace of goods, why may they be counted on to perceive their own best interests in the marketplace of ideas? If the free flow of information about goods and services cannot be presumed to lead to "the ultimate good desired" in the realm of commerce, why should it be supposed that "free trade in ideas" can produce beneficial results in the political realm?

The First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y.)

(L. Hand, J.), *aff'd*, 326 U.S. 1 (1945), *quoted in New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

Tolerating Rhode Island's experiment in information control thus has implications that go well beyond the commercial speech setting. People either are capable of discerning their own best interests or they are not. If people cannot perceive their own best interests in the realm of commerce, the supposition that they can do so in the realm of politics is also in error. But it would be fundamentally inconsistent with the First Amendment to suppress political speech on the assumption that people cannot perceive "their own best interests." It is no less fundamentally inconsistent with the First Amendment, as this Court recognized in *Virginia State Board of Pharmacy*, to suppress commercial speech on that paternalistic assumption.

If Rhode Island desires to keep prices for alcohol beverages high in order to dampen consumption, it should be required to muster, through open political debate, the support required to do so directly, through a system of price controls. The State should not be permitted to avoid the rigors of democratic decisionmaking by acting indirectly (and covertly), by imposing restrictions on speech that the State hopes will have the effect of keeping prices high — the result of "silence coerced by law." *Whitney v. California*, 274 U.S. 357-76 (1927) (Brandeis, J., joined by Holmes, J., concurring).

In short, the governmental interest asserted by Rhode Island to support its alcohol beverage price advertising ban is illegitimate under the First Amendment. The ban thus must be held to fail the second prong of the *Central Hudson* test.

B. The Court Should Overrule *Posadas* To the Extent That It Approved the Curtailment of Otherwise Protected Speech as an Indirect Means of Regulating Conduct.

In the teeth of the very principles that led it to extend First Amendment protection to commercial speech, the Court on one occasion has upheld a restriction on truthful, non-misleading commercial speech intended to influence consumer choices in the marketplace. In *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), the Court sustained a Puerto Rico statute that banned advertising of casino gambling directed to the local residents in order to reduce demand for casino gambling by such persons.[5]

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[5] The Court has seemed to assume the legitimacy of such manipulativeness for the purposes of its analysis in two other commercial speech cases, but this assumption was not necessary to the Court's holding in either case. Indeed, in both cases, the Court invalidated the challenged commercial speech restriction.

One of these cases was *Central Hudson* itself. The regulation challenged in that case prohibited promotional advertising by utilities in order to reduce energy consumption. The Court invalidated the regulation as more extensive than necessary to achieve this goal. Significantly, although the Court assumed the legitimacy of restricting speech to influence consumer behavior for the purposes of its analysis, the Court also emphasized the anti-paternalism rationale underlying First Amendment protection for commercial speech. 447 U.S. at 561-62. That rationale, however, is inconsistent with paternalistic objectives, as three members of the Court observed in concurring opinions. *See* 447 U.S. at 572 (Brennan, J., concurring in the judgment); *id.* at 573

(continued...)

Notably, the Court sustained the statute challenged in *Posadas* without any discussion of the fundamental issues raised by the Commonwealth's paternalistic motives. Three of the dissenting Justices, however, sharply criticized the Court's decision as incompatible with the rationale of *Virginia State Board of Pharmacy* and its progeny, including its basic rejection of restrictions on speech resting on the "benefits" of public ignorance. *See id.* at 350-51 (Brennan, J., joined by Marshall and Blackmun, JJ., dissenting). *See also id.* at 360 n.1 (Stevens, J., joined by Marshall and Blackmun, JJ., dissenting) (assessing possible consequences of "too much speech").

The dissenters were right. As Professor Philip B. Kurland noted at the time, *Posadas* was "inconsistent with

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[5] (...continued)
(Stevens, J., joined by Blackmun, J., concurring in the judgment)).

The other case was this Court's recent decision in *Coors*. The statute at issue in that case, which prohibited the display of alcohol content in malt beverage labeling, was viewed as intended to avoid "strength wars" that might stimulate consumption of malt beverages. The Court invalidated the statute under the third and fourth prongs of the *Central Hudson* test without questioning the legitimacy of the government's goal of trying to avoid strength wars by suppressing alcohol content information. Again, even as the Court seemed to assume the legitimacy of curtailing speech to influence behavior, it emphasized the indispensability of "the free flow of commercial information." 115 S. Ct. at 1589. *See id.* at 1594 (Stevens, J., concurring in the judgment). As in *Central Hudson*, the legitimacy *vel non* of the government's paternalistic aim was not a deciding factor in the case.

everything that [had] gone before."[6] Certainly *Posadas* is inconsistent with the rule stated in *Ibanez* and the anti-paternalism principles expressed in *Edenfield* and *Florida Bar v. Went For It, Inc.* *Posadas* cannot be reconciled with the principles of economic efficiency, democratic self-governance or individual autonomy in a free and open society, principles on which the First Amendment's protection for commercial speech rests.

The Court cannot have meant to repudiate those principles without discussion. To the contrary, as discussed above, the Court has reaffirmed those principles in subsequent cases. Both as a basis for reversing the judgment below, and to avoid misunderstanding and confusion in future cases, *Posadas* should now be overruled to the extent that it approved the curtailment of otherwise protected commercial speech as a means of manipulating lawful consumer behavior.[7]

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[6] *N.Y. Times*, Feb. 22, 1987, § E, p. 9. *See also* P. Kurland, Posadas de Puerto Rico v. Tourism Company: "'Twas Strange, 'Twas Passing Strange; 'Twas Pitiful, 'Twas Wondrous Pitiful," 1986 *Supreme Court Review* 1.

[7] *Cf. Adarand Constructors, Inc. v. Pena*, 63 U.S.L.W. 4523, 4531-32 (U.S. June 12, 1995) (overruling held to be warranted where decision had undermined "important principles" established in earlier cases); *United States v. Dixon*, 113 S. Ct. 2849, 2860 (1993) (overruling held to be warranted where decision "lack[ed] constitutional roots" and was "wholly inconsistent with earlier Supreme Court precedent"); *Swift & Co. v. Wickham*, 382 U.S. 111, 128-29 (1965) (overruling of decision held to be warranted to reaffirm pre-existing precedent).

III. THE FIRST AMENDMENT REQUIRES THE GOVERNMENT TO JUSTIFY A RESTRICTION ON COMMERCIAL SPEECH BY A PREPONDERANCE OF THE EVIDENCE, AND THE FACTS CLAIMED TO SUPPORT THE RESTRICTION MUST BE SUBJECT TO *DE NOVO* JUDICIAL REVIEW.

A. The Government Bears a Heavy Burden of Justification under the Third and Fourth Prongs of the *Central Hudson* Test.

Under the *Central Hudson* test, commercial speech that is not false, deceptive, or misleading may be restricted, but only if the State shows that the restriction "directly and materially advances a substantial state interest," and that the restriction advances that interest "in a manner no more extensive than necessary to serve that interest." *Ibanez, supra*, 114 S. Ct. at 2088; *Coors, supra*, 115 S. Ct. at 1589; *Florida Bar v. Went For It, supra*, slip op., at 5. Even if the purpose served by Rhode Island's alcohol beverage price advertising ban is viewed as "substantial," the State did not even begin to make the other showings required under the *Central Hudson* test.

The third and fourth prongs of the *Central Hudson* test are exacting.[8] The third prong ("directly advances") requires the government to prove that its restriction "will in fact" produce the desired result: A governmental body seeking to sustain a restriction on commercial speech

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[8] In *Florida Bar v. Went For It, supra*, the Court referred to the third and fourth prongs of the *Central Hudson* test as the second and third prongs. Slip op., at 5.

"'must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.'" *Ibanez, supra,* 114 S. Ct. at 2088 (quoting *Edenfield, supra,* 113 S. Ct. at 1800).

The fourth prong ("no more extensive than necessary") requires the government to demonstrate that the restriction is "sufficiently tailored to its goal." *Coors, supra,* 115 S. Ct. at 1592-93. A restriction on commercial speech is not "sufficiently tailored to its goal" if there exist other means by which the government could pursue its objectives "in a manner less intrusive to [the speaker's] First Amendment rights." *Coors, supra,* 115 S. Ct. at 1593. *See also City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1510 n.13 (1993).

The Court has stated time and again that the government bears the burden of justification. *Coors, supra,* 115 S. Ct. at 1592; *Ibanez, supra,* 114 S. Ct. at 2084; *Edenfield, supra,* 113 S. Ct. at 1800; *Bolger, supra,* 463 U. S. at 71 n.20. The Court has stressed that the government's burden under the third prong of the *Central Hudson* test "is not satisfied by mere speculation and conjecture." *Coors, supra,* 115 S. Ct. at 1592 (quoting *Edenfield, supra,* 113 S. Ct. at 1800)).

B. Rhode Island Failed To Carry Its Burden of Justification, and the Court Below Abdicated its Essential Reviewing Function.

Rhode Island failed to carry its burden of justification under the third and fourth prongs of the *Central Hudson* test. With regard to the third prong, it obviously cannot be said that Rhode Island "demonstrated" that its price advertising ban "will in fact" serve the State's asserted

"temperance" objective "directly and materially." To the contrary, the court below acknowledged that there was "no empirical evidence" as to the ability of Rhode Island's price advertising ban to accomplish its asserted purpose, and that the expert opinions on this point went "both ways." 39 F.3d at 7. With regard to the fourth prong, the court observed that the State's own witness had conceded the availability of alternatives to a price advertising ban that could achieve the State's asserted goal without curtailing speech. *Id.*

In the face of the State's perfect failure of proof, the court below was able to sustain Rhode Island's price advertising ban only by ratcheting down the applicable standard of review and by shifting the burden of persuasion to the petitioners.[9] The court held that Rhode Island's price advertising ban satisfied the third prong of the *Central Hudson* test because, in the court's view, the State's belief that the ban would accomplish its asserted objective made logical sense, and the petitioners had offered nothing by way of "affirmative contradiction" to refute that belief. 39 F.3d at 7-8. The court likewise held that the ban satisfied the fourth prong of the *Central Hudson* test on the ground that it was a "reasonable choice." *Id.* at 7.

The court's application of an erroneous standard of review is obvious. The court cited *Posadas* for the proposition that "warrantable inferences" might suffice to sustain Rhode Island's law under the third prong of the

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[9] In doing so, the court below relied on the "added presumption in favor of the validity of the state regulation" that it erroneously considered to be required by the Twenty-First Amendment. 39 F.3d at 7.

Central Hudson test. In *Posadas*, the Court indeed required comparatively little from the government by way of justification in upholding the challenged casino advertising ban. But subsequent decisions such as *Coors* and *Edenfield*, which emphasize the heavy burden of justification borne by the government when it attempts to restrict commercial speech, confirm that *Posadas* was anomalous in this respect, as it is in others. *See also Florida Bar v. Went For It, Inc.*, *supra*, slip op., at 1-2, 8-12 (sustaining a lawyer advertising restriction after "scouring" the extensive factual record developed by the State Bar, "which respondents at no time refuted"). In upholding Rhode Island's price advertising ban, the court below relied on nothing more than "speculation or conjecture." *Edenfield*, *supra*, 113 S. Ct. at 1800. That simply is not enough when speech is restricted on the basis of its content.[10]

The court below also relied on this Court's decision in *Trustees of the State University of New York v. Fox*, 492 U.S. 469 (1989), in concluding that Rhode Island had

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[10] Even the "warrantable inferences" on which the court below relied (39 F.3d at 7) are highly questionable. The State's belief that lower prices will result in increased consumption makes logical sense only if one assumes that people will consume as much alcohol as they can afford, or at least that current prices are preventing them from consuming as much alcohol as they would like. As an intuitive matter, however, it seems equally likely that people currently consume as much alcohol as they desire, and that if prices were reduced they would either spend the extra money on something else or "move up" to newly affordable higher-quality brands. Rhode Island's price advertising ban, of course, prevents them from doing either.

satisfied its burden under the fourth prong of the *Central Hudson* test. Even *Fox*, however, eschewed any test as "overly permissive" as the test applied by the court below, which imposed no burden on the State whatever to justify its choice as "narrowly tailored." *See* 492 U.S. at 480.

Moreover, despite this Court's insistence that the fourth prong of the *Central Hudson* test does not impose a least-restrictive-means requirement, the Court's decisions in such cases as *Discovery Network*, *supra*, and *Coors*, *supra*, have restored the fourth prong to something close to such a requirement. Specifically, the Court has stated that a restriction on commercial speech is not "sufficiently tailored to its goal" if there exist other means by which the government could pursue its objectives "in a manner less intrusive to [the speaker's] First Amendment rights." *Coors, supra,* 115 S. Ct. at 1593. Similarly, in *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1510 n.13 (1993), the Court stated that the existence of "obvious less-burdensome alternatives" is a "relevant consideration in determining whether the 'fit' between means and ends is reasonable."

In finding that the means chosen by Rhode Island to accomplish its asserted goals were "reasonable," the court held it to have been error for the District Court to engage in an independent weighing of the evidence to determine the "correctness" of the State's choices. 39 F. 3d at 7. In so doing, however, the court below not only misapplied the pertinent *Central Hudson* requirements but abdicated its own essential reviewing function in a First Amendment case.

The First Amendment's protections would be meaningless if courts were to defer to legislative

determinations that restrictions on speech are justified. Such deference is not and has never been the rule. To the contrary, as this Court has emphasized, "'[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake.'" *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 129 (1989) (citation omitted). With respect to factual findings that are "relevant to resolving a constitutional issue," the Court has stated that "whatever deference is due legislative findings [cannot] foreclose our independent judgment of the facts bearing on an issue of constitutional law." *Id.*

It is the judiciary's task in the end "to decide whether [the legislature] has violated the Constitution." *Id.* Courts "are obliged to make a fresh examination of crucial facts" in First Amendment cases, to protect against any "forbidden intrusion on the field of free expression." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, No. 94-749, slip op., at 9-10 (June 19, 1995) (citations and quotations omitted). *De novo* judicial review of "crucial facts" must be required whenever speech is targeted on the basis of its content, because "the reaches of the First Amendment are ultimately defined by the facts that it is held to embrace." *Id.* at 9.[11]

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[11] *See also Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445 (1994). In *Turner*, the Court considered a First Amendment challenge to provisions of the Cable Television Consumer Protection and Competition Act of 1992. Finding that there were factual issues to be decided in the case regarding whether the challenged rules "will in fact advance" the government's asserted interests, the Supreme Court reversed the lower court's grant of summary judgment in the case. The Court stated:

(continued...)

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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[11] (...continued)

> [B]ecause there are genuine issues of material fact [in this regard] still to be resolved on this record, we hold that the District Court erred in granting summary judgment in favor of the Government. Because of the unresolved factual questions, the importance of the issues * * *, and the conflicting conclusions that the parties contend are to be drawn from the statistics and other evidence presented, we think it necessary * * * to allow the District Court to resolve any factual disputes remaining, before passing upon the constitutional validity of the challenged provisions.

Id. at 2472 (citations omitted).